IN THE COUNTY COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2019MM002346AXXX
DIVISION B

STATE OF FLORIDA

vs.

ROBERT KRAFT,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS[1]

Defendant's Motion to Suppress came before the Court on April 26, April 30, and May 1, 2019. William A. Burck, Esq. and Alexander B. Spiro, Esq. represented Defendant. Michael G. Kridos, Judith S. Arco, and Elizabeth Neto, Assistant State Attorneys, represented the State of Florida.

Based on the testimony, evidence, case and statutory law, and argument of counsel, the Court finds:

1. Defendant is charged with violating § 796.07(2)(f) and (5)(a)1, Florida Statutes, soliciting another to commit prostitution, pursuant to Informations filed February 25, 2019.[2]

2. On or about January 15, 2019, Detective Andrew Sharp of the Jupiter Police Department submitted to Circuit Judge Howard Coates an eleven-page search warrant titled Affidavit and Application for Search Warrant Authorizing The Monitoring And Recording Of Visual, Non-Audio Conduct, copy of which is attached hereto as Exhibit A. On January 15, 2019, Judge Coates signed a Search Warrant Authorizing the Monitoring And Recording

of Visual, Non-Audio Contact, copy of which attached hereto as Exhibit B, relying on Det. Sharp's Affidavit in issuing the search warrant.

3. On the basis of the search warrant, Det. Sharp surreptitiously installed five cameras in Orchids of Asia Day Spa located in Jupiter, Florida. One camera captured video of people entering the front section of the business. All customers seeking services at the Spa entered this section and paid for the desired services at the front desk. After paying for services, the customer was then taken to one of a number of massage rooms. Det. Sharp installed hidden surveillance cameras in four of the massage rooms. These cameras captured visual images only and had no audio recording capability. These rooms were recorded continuously while the Spa was open for business for five consecutive days.

4. On January 19, 2019 and January 20, 2019, a hidden camera captured images of Defendant allegedly engaging in illegal sexual activity.[3] When Defendant left the Spa on January 19, 2019, he entered a car as a passenger and a Jupiter police officer followed the car for a brief time. The officer then radioed to another Jupiter police officer that Defendant was approaching the area where the second officer was stationed, and the second officer got behind and eventually stopped the car. The sole purpose of stopping the car was to identify Defendant as the person who had left the Spa a few minutes earlier.

5. Defendant invokes the Fourth Amendment[4] in seeking to suppress the videotapes of Defendant allegedly engaging in illegal activity. The alleged criminal activity occurred not in a home, where the most stringent Fourth Amendment protection is granted, but in a commercial setting. However, the "capacity to claim the protection of the Fourth

Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[5] While Defendant was an invitee of the business establishment in which the alleged acts occurred, the Court finds it clear that he had a reasonable, subjective expectation of privacy, as would anyone seeking a private massage in a commercial or professional setting, and that the activity in that room would remain private. Seeking even legitimate services in a spa normally involves removing all or most of a person's clothing, behavior almost as private as would occur in a home. Furthermore, that expectation of privacy is one which this Court believes society objectively supports as reasonable.[6]

6. That Defendant may have been engaged in criminal activity is not material in determining whether society is prepared to recognize an objective expectation of privacy. As stated in McDade v. State:

> Privacy expectations do not hinge on the nature of [a] defendant's activities – innocent or criminal. In fact, many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests.[7]

The McDade court goes on to say that:

> We may not justify the search after the fact, once we know illegal activity was afoot; the legitimate expectation or privacy does not depend on the nature of the defendant's activities, whether innocent or criminal.[8]

Because Defendant had a subjective expectation of privacy, an expectation society would

find objectively reasonable, Defendant has standing to challenge the search warrant.

7. There are no federal or Florida statutes specifically authorizing or prohibiting surreptitious video surveillance, also called 'sneak and peek' or delayed notice searches. Likewise, there are no rules of criminal procedure, federal or Florida, specifically addressing surreptitious video surveillance. There is also a dearth of Florida cases offering guidance on this issue.[9] Consequently, courts (mainly federal) have relied on a combination of Fourth Amendment principles, statutory guidelines, and rules of criminal procedure employed in analogous situations to determine the admissibility of evidence obtained through surreptitious video surveillance. While Florida courts are bound only to follow United States Supreme Court decisions on Fourth Amendment issues,[10] the uniquely intrusive nature of video surveillance, and how infrequently it seems to be employed in Florida, indicates to this Court that federal case law is instructive.

8. The primary case guiding this Court, as it has other courts, is United States v. Mesa-Rincon.[11] This is one of the cases Detective Sharp cited and relied on in his search warrant.

9. Mesa-Rincon involved surreptitious video surveillance conducted at the request of the United States Secret Service in a specified building in which the defendants were suspected of counterfeiting United States currency. The court's order authorized nonverbal conduct to be intercepted and recorded. The order authorized the equipment to be installed and maintained surreptitiously. Video surveillance captured the suspects counterfeiting. Defendants moved to suppress all video evidence. The court denied Defendants' motion. The court relied on a combination of federal criminal rules (Rule 41b), federal case law, and

federal statutory law (Title III of the Omnibus Crime Control and Safe Streets Act of 1968) in finding the court had authority to issue the search warrant. The court acknowledged Congress had not defined the constitutional requirements for video surveillance.

10. Mesa-Rincon, in considering the purpose of the Fourth Amendment and intrusiveness of video surveillance, establishes five requirements a court must consider before video surveillance can be permitted. Those five requirements are:

a. a showing that probable cause exists that a particular person is committing, has committed, or is about to commit a crime;

b. the order particularly describes the place to be searched and the things to be seized in accordance with the Fourth Amendment;

c. the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation;

d. the judge issuing the order finds that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous;

e. the order does not allow the period of interception to be longer than necessary to achieve the objective of the authorization, or in any event no longer than thirty days.[12]

11. Suppressing the unlawfully seized evidence is the remedy for failing to satisfy these five requirements.[13]

12. A reviewing court is required to give "'great deference' to a magistrate's probable cause determination" and its function is "simply to ensure that the issuing magistrate had a substantial basis for concluding that probable cause existed."[14] This Court finds that the search warrant affidavit of Det. Sharp provided a sufficient basis for the issuing judge to find

probable cause to conduct the search.

13. This Court further finds that the search warrant satisfies the particularity requirement. It specifically names Hua Zhang as being in control of the premises, and further authorizes "video recordings of individuals engaged in acts related to these violations." This broad description is similar to language approved in Mesa-Rincon.[15]

14. The Court finds Defendant has failed to prove by a preponderance of the evidence that the highly intrusive technique of surreptitious video surveillance is unreasonable under the circumstances. Video surveillance requires a very high showing of necessity, higher than audio surveillance. The video surveillance of the lobby and front desk is clearly acceptable as this is a public area of the Spa where a client would have a very low expectation of privacy. That expectation of privacy increases exponentially when the client enters one of the massage rooms; however, the unique circumstances of a massage room creates the need for an unusually intrusive law enforcement technique. That other agencies may have employed different law enforcement techniques is not persuasive to this Court, especially considering the risk of alerting the Spa to being the subject of an investigation.

15. The Court also finds the time limitation, five days unless otherwise approved by the court, to be reasonable and consistent with Mesa-Rincon.[16]

16. However, the Court finds the minimization requirement has not been satisfied in at least two respects: first, the search warrant itself is insufficient; and, second, minimization techniques were not sufficiently employed.

17. The order approved by the court in Mesa-Rincon specifically required minimization

and outlined the minimization procedures to be followed.[17] The search warrant in this case does little to none of that. The search warrant does describe the places where cameras are to be installed, specifying no cameras are to be placed in the kitchen, bathroom, and personal bedrooms. But a spa client, whether engaging in innocent or illegal activity, would not be likely to frequent those three areas. The search warrant does not assert that criminal activity is suspected to be occurring in these three areas. Consequently, that limitation does little to further minimization. Furthermore, the search warrant does not address how to minimize the impact of video surveillance on female Spa clients. All of the assertions of illegal activity in the search warrant suggest or describe only male genital stimulation. The pre-search warrant investigation – such as reviewing websites and reviews of the Spa contained therein, obtaining physical evidence, and seeing slang terms used to describe alleged illegal activities in the Spa – all focused on male clientele. However, the Spa advertised services for women clients and, in fact, more than one woman had a significant portion of her Spa time viewed by a detective-monitor and the entirety of her spa time recorded and placed in Jupiter Police Department records. Failing to consider and include instructions on minimizing the impact on women, through a highly intrusive law enforcement technique in a setting with a high legitimate expectation of privacy, is a serious flaw in the search warrant, especially considering that the search warrant did not allege women were seeking illegal contact.

18. The search warrant also fails to include any minimization techniques or directives as to how detective-monitors should respond when viewing male spa clients receiving lawful services, or male clients when no probable cause can be established. This omission is also a

serious flaw in the search warrant. The testimony indicates the videotapes of these individuals remain in the records of the Jupiter Police Department.

19. The Court also finds that the implementation of minimization techniques was flawed. Both detective-monitors testified that their only direction about minimization consisted of being directed to look for illegal activity. That direction is simply insufficient to satisfy the minimization requirement.[18] Also, there were no written guidelines provided to the detective-monitors to direct their minimization.[19] Consequently, the detective-monitors did not have a common standard to guide them as to how they were to minimize surveilling innocent behavior or behavior that did not rise to the level of probable cause. The detective-monitors were simply left to their own standards and devices to satisfy the minimization requirement. One of the detective-monitors testified about discussing minimization with a spouse who also works in law enforcement. The other detective-monitor testified that he relied on previous experience in determining what and how to minimize. Knowledge about minimization in general does not satisfy the minimization required in a specific setting, especially one with a legitimately high expectation of privacy. This resulted in inconsistent application of minimization techniques.

20. The fact that some totally innocent women and men had their entire lawful time spent in a massage room fully recorded and viewed intermittently by a detective-monitor is unacceptable and results from the lack of sufficient pre-monitoring written guidelines. As previously noted, the search warrant affidavit gave no indication that women sought any form of sexual contact at the Spa. The detective-monitor's explanation that she was not sure

whether the woman would partake in illegal sexual contact is not acceptable and results from a lack of clear, written guidelines.

21. During the course of five days of video surveillance, the detective-monitors observed two circumstances that should have alerted them that illegal activity was not likely to occur during a massage and those individuals' exposure to surveillance should have been minimized. These circumstances are those individuals (male or female) who left on their underwear, and massages in rooms where lights were not dimmed. Admittedly, these clues to legitimate activity may not have been known to the detective-monitors at the outset of surveillance. However, these clues distinguishing legitimate and possibly illegitimate activity in the massage room should have been recognized by the detective-monitors as they conducted surveillance and the detective-monitors should have responded accordingly. The fact that, apparently, one male started with underwear on but had his underwear later removed does not excuse the greater number of surveilled and recorded innocent customers.

22. Strictly adhering to minimization requirements is essential because relative to wiretapping and bugging, video surveillance "is even more invasive of privacy, just as a strip search is more invasive than a pat down search."[20] Video surveillance is a constant form of search that takes place over an extended period of time, and for that reason, it often captures innocent behavior that is intended to be private.[21]

23. The Court finds that the search warrant does not contain required minimization guidelines, and that minimization techniques employed in this case did not satisfy constitutional requirements. Consequently, the court grants Defendant's Motion to Suppress

and all evidence against Defendant obtained through and in connection with the search warrant is suppressed.

24. Immediately after Defendant left the Spa on January 19, 2019, and after video surveillance captured his image in real time, he was followed by a Jupiter Police Department officer who then notified another officer to stop the car in which Defendant was a passenger. The stopping officer obtained the identification of Defendant through the stop; Defendant's identify was not known to law enforcement until he was stopped. Therefore, all information obtained through the stop is suppressed as the fruit of an unlawful search.[22]

Based on the foregoing, Defendant's Motion to Suppress is granted and all evidence obtained against Defendant through and in connection with the search warrant is suppressed.

Furthermore, all information obtained about Defendant as the result of the traffic stop on July 19, 2019 is also suppressed.

ORDERED at West Palm Beach, Florida, on this 13 day of May 2019.

LEONARD HANSER
County Court Judge

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[1] The Court has been made aware that the State nolle prossed Case No. 2019MM002348AXXX on May 13, 2019 and the charge therein consolidated under Case No. 2019MM002346AXXX. This Order, to be clear, addresses each Motion in each case as originally filed.

[2] The charge is identical in both cases.

[3] The Court has viewed in camera all videotapes the parties stipulated the Court should view.

[4] Defendant raises a number of other arguments but the Court finds Fourth Amendment concerns govern the Court's ruling.

[5] Rakas v. Illinois, 439 U.S. 128, 143 (1979) (internal citations omitted).

[6] The Court notes section 877.26 of the Florida Statutes, recognizes a "reasonable expectation of privacy" from commercial video surveillance in a dressing room, fitting room, changing room, and restroom, situations analogous to this case. § 877.26(1), Fla. Stat. (2018).

[7] 154 So. 3d 292, 299 (Fla. 2014) (quoting United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997)).

[8] Id. (quoting United States v. Pitts, 322 F.3d 449, 458-459 (7th Cir. 2003)).

[9] The most useful Florida case this Court has found is State v. Butler, 1 So. 3d 242 (Fla. 1st DCA 2009). In Butler, the trial court suppressed on Fourth Amendment grounds videotape surveillance of a mother in her child's hospital room in West Virginia. The mother was suspected of harming her child (another child of the mother had died previously while living in Florida) due to experiencing Munchausen Syndrome by proxy. Through state action, a video camera was hidden in the child's hospital room and captured the mother appearing to attempt to harm the child. The trial court suppressed the West Virginia hospital videotape when Florida prosecuted the mother for the death of her first child but the appellate court reversed the trial court's decision, finding the mother had no reasonable or legitimate expectation of privacy in her child's hospital room, and no Fourth Amendment protection, under the peculiar facts of the case.

[10] Art. I, §12, Fla. Const. See Amison v. State, 5 So. 3d 798, 800 (Fla. 2d DCA 2009) ("Neither the trial court nor this court is bound by the rulings of lower federal courts").

[11] 911 F.2d 1433 (10th Cir. 1990).

[12] Id. at 1437.

[13] Id. at 1436.

[14] Mesa v. State, 77 So. 3d 218, 221 (Fla. 4th DCA 2011) (internal citations omitted) (quoting State v. Rabb, 920 So. 2d 1175, 1180 (Fla. 4th DCA 2006)).

[15] 911 F.2d at 1441.

[16] Id. at 1445.

[17] Id. at 1441-1442.

[18] While not a perfect analogy, the Court finds helpful the example of the strictures placed on law enforcement in implementing roadblocks. Both roadblocks and this case implicate Fourth Amendment rights. Roadblocks are warrantless seizures and must be undertaken pursuant to a written plan embodying specific neutral criteria which limit the conduct of the individual officers. State v. Jones, 483 So. 2d 433, 438 (Fla. 1986). These guidelines detail the procedures officers are to follow at the roadblock and are intended to prevent the officers from acting with "unbridled discretion." In one Florida roadblock case, the appellate court found the absence of written guidelines fatally defective and suppressed all evidence obtained therefrom. Hartsfield v. State, 629 So. 2d 1020 (Fla. 4th DCA 1993). Avoiding officers acting with "unbridled discretion" during video surveillance is one goal of minimization techniques.

[19] This is an important distinction between this case and State v. Frahm, 2019-000445-MM (Martin County, County Court, Kathleen H. Roberts, J., May 1, 2019). The Frahm order references "Minimization Instructions" indicating there must have been written guidelines. Judge Roberts' order found those instructions were not

followed in executing the search warrant.

[20] United States v. Torres, 751 F. 2d 875, 885 (7th Cir. 1984).

[21] State v. Butler, 1 So. 3d 242, 250 (Fla. 1st DCA 2009) (Padovano, J., dissenting).

[22] Wong Sun v. United States, 371 U.S. 471 (1963).

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